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In The

Supreme Court of the United States

October Term, 1984

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,

v.

FEDERAL LABOR RELATIONS AUTHORITY,
Respondent.

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, NATIONAL COUNCIL OF EEOC LOCALS,
Intervenor.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

RONALD A. ZUMBRUN
JOHN H. FINDLEY
COUNSEL OF RECORD
JONATHAN M. COUPAL
OF COUNSEL
Pacific Legal Foundation
555 Capitol Mall, Suite 350
Sacramento, California 95814
Telephone: (916) 444-0154
Attorneys for Amicus Curiae Pacific Legal Foundation

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

This motion of Pacific Legal Foundation (PLF) for leave to file the annexed brief amicus curiae is respectfully submitted pursuant to Supreme Court Rule 36. Petitioner and respondent have consented to the filing of this brief and the consent of each has been lodged with the Clerk of this Court. Intervenor has withheld consent.

Pacific Legal Foundation is a nonprofit corporation organized and existing under the laws of California for the purpose of litigating in the public interest. Policy for PLF is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. The Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position is in furtherance of the public interest. The Board of Trustees has approved the filing of the amicus curiae brief in this matter.

PLF, since its inception, has advanced the causes of limited government and furtherance of the free enterprise system. By submitting an amicus curiae brief in this case PLF will advance these tenets. PLF's position is that the public has a strong interest in the expansive use of the private sector by federal agencies in obtaining goods and services. The practice promotes a more efficient governmental and administrative system, concomitantly benefiting the public with better services at lower cost. Additionally, such interaction with the private sector enhances productivity and the free enterprise system through competitive bidding and expanded commercial opportunities. As such, the public interest in an agency's ability to effectively contract out is substantial.

For these reasons, Pacific Legal Foundation requests that this motion to file the annexed brief amicus curiae be granted.

DATED: August, 1985.

Respectfully submitted,

RONALD A. ZUMBRUN
JOHN H. FINDLEY
COUNSEL OF RECORD
JONATHAN M. COUPAL
OF COUNSEL

By _____
JOHN H. FINDLEY

Attorneys for Amicus Curiae
Pacific Legal Foundation

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BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

INTEREST OF AMICUS

The interest of amicus is set out in the preceding motion for leave to file this brief.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 744 F.2d

842 (1984). The decision and order of the Federal Labor Relations Authority is reported at 10 F.L.R.A. 3 (1982).

SUMMARY OF ARGUMENT

The practice of contracting out by the federal government is in the public interest. The policy of the United States government, and one which should be continued, is to rely on private, commercial sources to provide goods and services whenever they can be procured more efficiently from the free enterprise sector. This results in a more effective government and productivity enhancement for private business. Consequently, management needs to be unhindered by public employee collective bargaining and grievances in making contracting out decisions.

Congress embodied this policy in Section 701 of the Civil Service Reform Act. 5 U.S.C. § 7106. The plain language of this section provides for agency managerial discretion in many areas, including contracting out. Contrary to the decision of the court below, the phrase "in accordance with applicable laws" should not be interpreted in a manner which results in this decisional freedom being interrupted. When interpreted in its entirety, Section 701 is not, as the court below held, subservient to the statutory grievance procedure in the Civil Service Reform Act. Interpreting this section (entitled "Management Rights") in such a crabbed manner renders it meaningless, resulting in an unwarranted dilution of managerial discretion in the area of contracting out.

STATEMENT OF THE CASE

The Civil Service Reform Act, 5 U.S.C. §§ 7101-7135, governs labor-management relations in the federal sector and was intended to balance the right of federal employees to engage in concerted activity with the need of federal managers to achieve an "effective and efficient Government." 5 U.S.C. § 7101(b). The provision of the Act at issue in the case before the Court is Section 7106 which reads "nothing in [this Act] shall affect the authority of any management official of any agency . . . to assign work, *to make determinations with respect to contracting out,* and to determine the personnel by which agency operations shall be conducted." (Emphasis added.)

During contract negotiations with the Equal Employment Opportunity Commission (EEOC), the union proposed that the agency agree to comply with an Office of Management and Budget circular relating to contracting out. By its own terms, the circular does not "create any substantive or procedural basis for any person to challenge any agency action or inaction on the basis that such action was not in accordance with [the] Circular." EEOC refused to bargain on this issue in light of the clear statutory language of the Civil Service Act which places the subject matter of contracting out beyond collective bargaining. The union (AFL-CIO) sought an order from the Federal Labor Relations Authority to force EEOC to bargain over the applicability of the circular. This appeal arises out of the granting of that order.

ARGUMENT

I

ELEMENTAL RULES OF STATUTORY CONSTRUCTION REQUIRE THAT PETITIONER BE UNIMPAIRED BY COLLECTIVE BARGAINING AND GRIEVANCE PROCEDURE IN MAKING CONTRACTING OUT DETERMINATIONS

The Civil Service Reform Act provides that "nothing in [the federal law relating to federal labor-management relations] shall affect the authority of any management official of any agency . . . in accordance with applicable laws . . . to make determinations with respect to contracting out . . . ." 5 U.S.C. § 7106. A simple reading of the statute indicates that contracting out determinations are intended to be left to the discretion of the agency. But even if a simple reading is not sufficient, the same conclusion is reached by reference to basic rules of statutory interpretation.

A. The Meaning of the Statute Must Be Sought in the Language in Which the Act Is Framed

This Court has repeatedly held that the judicial inquiry into the meaning of a statute must first find its situs in the language of the Act itself. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197 (1976); *Caminetti v. United States*, 242 U.S. 474, 485 (1917). As *Caminetti* directs, once the Court's attention has been directed to the pertinent language, the "[s]tatutory words are uniformly presumed, unless the contrary appears, to be used in their ordinary . . . sense, and with the meaning commonly attributed to them." *Id.* at 485-86. If these words are free from doubt and admit of no more than one meaning, the Court's function is to enforce the statute according to its terms.

In interpreting Section 7106, there is no need to look beyond the four corners of the statute itself. None of the words or phrases contained in that section purports to have dual meanings or technical definitions beyond ordinary understanding. Employing the *Caminetti* inquiry, neither has Congress expressed a contrary intention that the language is to connote anything but the "meaning commonly attributed to them." Indeed, Congress has expressed itself in "familiar English words [with] no hint by the draftsmen of the words that they meant to use them in any but an ordinary sense." *Addison v. Holly Hill Fruit Products,* 322 U.S. 607, 618 (1944).

Moreover, the policy and intent of this section, ascertainable from the language itself,[1] is a congressional desire to preserve certain management prerogatives and to protect agency authority. Not only is this clear from the wording of the section's title—Management Rights—but the detailed listing of powers is indicative of a legislative purpose to repose in management alone specified substantive authority, thus better promoting administrative efficiency. This clear legislative policy afforded to agency management in making contracting out decisions should not be stifled "by a pedantic or grudging process of construction." *Id.* at 617.

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[1] "[W]hen words are free from doubt they must be taken as the final expression of the legislative intent. . . ." *Caminetti v. United States,* 242 U.S. at 490. "Ascertainment of congressional intent with respect to the standard of liability created by [10b-5] must . . . rest primarily on the language of that section." *Ernst & Ernst v. Hochfelder,* 425 U.S. at 200.

B. The Court Below Misinterpreted the Phrase: "[I]n Accordance with Applicable Laws"

Despite the clear language of Section 7106 removing contracting out determinations from being subject to federal labor negotiations the court below found, as authority for its opinion, the "restriction" that contracting out determinations must be made "in accordance with applicable laws." In reality, this phrase is no restriction at all.

The dissent below correctly identified the plain error committed by the majority in interpreting the phrase to include the statutory grievance procedure codified in Section 7121. 744 F.2d at 857. Under the majority's analysis, the union proposal regarding the applicability of the circular did not affect management's substantive authority reserved pursuant to Section 7106, because the grievance procedure was independently available. 744 F.2d at 850. However, the majority, in interpreting the phrase as allowing a grievance based on virtually "any matter," *id.* at 849, completely eviscerates Section 7106. The majority's interpretation of this phrase not only ignores the rules of statutory construction, but it also undermines the policy embodied in the code section.

The majority previewed the pertinent language of Section 7106(a) and then rejected the EEOC's argument (management has complete discretion in contracting out decisions) as "untenable in light of the plain text of the clause." 744 F.2d at 848. Unfortunately, the majority violated its own use of the plain meaning rule. It recognized that "nothing in this chapter shall affect the authority of any management official," 5 U.S.C. § 7106, yet the opinion then allowed the grievance procedure to have a

substantial impact on that authority. As Judge MacKinnon correctly characterized the majority opinion:

> "Thus, [the majority] in effect reads the statute as follows: 'Nothing in this chapter [71], EXCEPT ALL THE OTHER PROVISIONS OF CHAPTER 71, INCLUDING § 7121 (PRESCRIBING GRIEVANCE PROCEDURES), shall affect the authority of any management official . . . .' It is absurd to construe the act to say that '*nothing*' in the rest of Chapter 71 affects management's right, but that the rest of Chapter 71 *does* affect that right." 744 F.2d at 857 (emphasis in original).

In addition to this self-contradictory interpretation of the statute, the majority also undermined the interpretive guidelines of *Addison* by stifling legislative policy with distorted construction. As Judge MacKinnon persuasively contended, the union proposal, by embodying Office of Management and Budget (OMB), Circular A-76, 48 Fed. Reg. 37,110 (August 16, 1983), Circular A-76, in effect provided substantive policy making criteria, *i.e.*, cost-effectiveness guidelines. 744 F.2d at 855. Such a proposal, contrary to the majority's contention, directly interferes with the Section 7106(a) powers of management and thus disregards congressional intent.[2]

In addition to the above, further evidence indicates the majority's uncertainty in its interpretation of the phrase "in accordance with applicable laws." First, the majority treats the circular as an "applicable law" within the meaning of the contested phrase. Unfortunately, this overlooks the crucial fact that the circular is not "law" at

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[2] *Compare Department of Defense, Army-Air Force Exchange Service v. Federal Labor Relations Authority*, 659 F.2d 1140 (D.C. Cir. 1981); union proposal regarding seniority criteria held to interfere with Section 7106(a) rights. *Id.* at 1159.

all but only a statement of executive policy accompanied by cost-effectiveness guidelines. The circular itself states that it merely "establishes federal policy regarding the performance of commercial activities." Circular A-76, 48 Fed. Reg. at 37,110. Moreover, in *American Federation of Government Employees v. Brown,* 680 F.2d 722 (11th Cir. 1982), the court in referring to Section 806 of the Department of Defense Authorization Act noted that "[s]ection 806(a) had the effect of elevating certain aspects of Circular A-76 to the status of law." *Id.* at 724. Implicit in this statement is that the circular standing alone has no legal force. It is simply an executive managerial tool for implementing the government's policy of relying on private concerns. *Local 2855, AFGE (AFL-CIO) v. United States,* 602 F.2d 574, 582 n.28 (3d Cir. 1979). This is consistent with the comptroller general's conclusion that the circular is merely an expression of executive policy and does not have the status of law. 26 Cont. Cas. Fed., Paragraph No. 83,319 (1979).

Second, while the court below contended that management's contracting out authority is limited by the "applicable laws" phrase, the opinion is silent as to the situs of these laws. The reader is referred to no specific code sections. The court makes continued reference to "statutory or regulatory parameters" (744 F.2d at 851) and "requirements" (*id.* at 848), but these general labels provide little, if any, direction.

Amicus contends that the phrase here in question is of de minimis significance in an interpretation of Section 7106. Admittedly, the rule is that effect must be given to every clause within a statute; the cardinal principle of statutory construction is to save and not to destroy. *United*

States v. Menasche, 348 U.S. 528, 537 (1955). However, the phrase "in accordance with applicable laws" in the context of Section 7106 merely acknowledges the existence of statutes dealing with those items enumerated in Section 7106(a)(2)(A)-(D). While there is no indication by Congress as to the precise meaning of "applicable laws," what is certain is that "applicable laws" do *not* encompass other sections of the chapter (Section 7106(a)). This effectuates congressional policy regarding the management prerogative. Consequently, this phrase is a broad provision referring to any applicable laws—except those provisions, such as Section 7106, which are specifically removed from applicability.

C. Requiring EEOC to Bargain over the Contracting Out Proposal Renders Section 7106(a) Meaningless, a Result Totally Inconsistent with Congressional Intent and Statutory Construction

As previously mentioned, Judge MacKinnon persuasively argued that the proposal advanced by the union was in fact substantively oriented and thus impacted on management's authority and statutory rights. The majority's position, in turn, is completely opposite, finding the proposal negotiable. The result of the majority's decision is that the union is able to achieve precisely what the management rights clause was designed to prevent. This interpretation renders Section 7106 meaningless.

In interpreting Section 7106, several tenets of construction are persuasive. First, the section explicitly provides that "nothing in this chapter *shall* affect" management authority. (Emphasis added.) The emphasized language signals a mandatory construction of this provision.

This mandatory language is buttressed by the principle set forth in *Mastro Plastics Corp. v. National Labor Relations Board,* 350 U.S. 270, 285 (1956): When expounding a statute, the overall object and policy of the law is useful in interpretation. The language of Section 7106 indicates a strong congressional intent to preserve management prerogative and decision making. The combination of the mandatory word choice and the congressional policy indicates the overall importance of this section of the 1978 Act.

More importantly, the entire purpose of bargaining over a proposal such as this is to decide whether or not the proposal should be incorporated into the collective bargaining agreement. The union's goal, of course, is incorporation. Such an outcome, however, is even more destructive of Section 7106. Once the proposal is incorporated, any alleged violation is referred to an arbitrator. This places the ultimate authority to make determinations with respect to contracting out in the arbitrator's hands, completely invalidating the management rights provisions in Section 7106. No result could be more contrary to congressional intent.

Hence, the majority's opinion, in advancing the negotiability of the substantive proposal, has gutted the paramount provisions of Section 7106. In so doing, it has not only ignored rules of statutory construction, but it has also countermanded Congress' purpose in enacting Section 7106—the protection of management rights to promote an efficiently administered agency.

II

CONTRACTING OUT BY GOVERNMENTAL AGENCIES IS IN THE PUBLIC INTEREST

The relationship between the public and private sectors has significantly changed during the last several decades. What were formerly traditional distinctions between government and private industry are no longer. As one writer has stated:

> "[T]he . . . national interests which are at stake no longer permit science and technology to advance at the pace that economic factors would alone dictate. . . . [B]ecause of the importance of atomic energy and aerospace technology . . . the American people have found it necessary to finance . . . technological activity. The preponderance of the nation's scientific and engineering talent remains in the private sector. . . . [T]he government . . . has continued to depend upon nongovernmental sources."[3]

While the above speaks to the narrowing gap between government and the private sector in the area of research and development, this premise is applicable to all areas of government and private relations.[4] Moreover, this growing closeness between both sectors necessarily involves contracting out determinations.

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[3] Johnson, *The Expanding Role of Contract in the Administration of Research and Development Programs,* 31 Geo. W. L. Rev. 747, 749 (1963).

[4] *See California State Employees' Association v. Williams,* 7 Cal. App. 3d 390, 398-99 (1970); *Private Responsibility for Public Management,* Harv. Bus. Rev. 7 (March-April, 1967).

A. Contracting Out by Governmental Agencies Promotes Cost-Effectiveness and Administrative Efficiency

It is the stated policy of the United States government to attain quality and cost-effectiveness whenever feasible through contracting out. Indeed, this is the controlling premise upon which Circular A-76 is based. As noted in *American Federation of Government Employees v. Brown*, 680 F.2d at 724:

> "The general policy of the federal government is to rely on competitive private enterprise to supply the products and services it needs except when . . . cost analysis indicates that procurement from a private source is not as cost-effective as in-house performance."

This concern for efficiency is seen on a broader scale throughout the entire 1978 Civil Service Reform Act. Section 7101(b) specifically mandates that the language of the Act be interpreted "in a manner consistent with the requirement of an effective and efficient Government." As the controlling theme pervading the entire Act, it indicates congressional intent strongly favoring contracting out.

There are several examples of just how effective the use of contracting with private enterprises has proven. For instance, in *Brown*, 680 F.2d at 722, the Army had contracted out maintenance, transportation, and supply services to private firms. The estimated 58-month savings from these programs was $32 million. *Id.* at 724. On a broader across-the-board implementation of Circular A-76, the Department of Defense has reported annual savings of $409 million since 1979. United States Office of Management and Budget, *Management of the United States*

Government: Fiscal Year 1986 at 45 (1985). This same report by the OMB noted that "[r]ecent experience shows that improved quality as well as cost reductions averaging over 20% have been obtained through well-planned cost competitions with private business." *Id.* at 43.

These savings, however, are only at the threshold of major cost reductions. Circular A-76 has been effective to date, but its implementation has been poor. Hence, the OMB is undertaking to refocus the program by establishing a productivity clearinghouse. *Id.* at 44. The president's study on private cost control estimates that such aggressive implementation of Circular A-76 could produce a three-year savings of $7.39 billion. 10 President's Private Sector Survey on Cost Control, *Report on Management Office Selected Issues: Opportunities Beyond PPSSCC* at 2 (1983).

In addition to these cost benefits of contracting out, another result of this governmental practice is improved administrative agency quality and efficiency. Indeed, Circular A-76 requires agencies to develop performance standards and quality assurance plans to evaluate results. The OMB is also formulating government wide performance standards. OMB, *Management of the United States Government: Fiscal Year 1986* at 44.

Through contracting out, not only is management able to exercise its discretion and choose the most productive contractor, but commercial bidders can enhance agency productivity. The above OMB study recognized improved quality through private sector participation. *Id.* at 43. This by-product of efficient government was perhaps best explained by the District of Columbia Circuit Court of Appeals in *National Treasury Employees Union v. Federal*

Labor Relations Authority, 691 F.2d 553, 563 (D.C. Cir. 1982):

> "[T]he right to determine what work will be done, and by whom . . . is at the very core of successful management . . . . It follows necessarily that this right is essential to management's ability to achieve optimum productivity, and accordingly to the agency's ability to function in an effective manner."

The pursuit of contracting out is an established governmental policy resulting in more efficient use of tax dollars and improved agency operations. This policy has been, and remains, in the public interest.

B. Contracting Out Benefits the Private Sector Through Enhanced Productivity and Competition

In addition to placing its own house in order through cost-efficiency and effectiveness, the government's contracting out policy is also geared toward private benefit. Indeed, the circular specifically notes that "[c]ompetition enhances quality, economy, and productivity." OMB Circular A-76, Paragraph No. 5(a).

Moreover, this policy has been specifically codified by legislative enactment. Under the defense department procurement policy (10 U.S.C. §2301, *et seq.*), Congress has made its purposes quite clear. Section 2301, for instance, states that "contracts, when appropriate, provide incentives to contractors to improve productivity through investment in capital facilities, equipment, and advanced technology." The same section continues by expressing interest in small business and recommending that a "fair proportion" of purchase contracts be placed with such concerns.

These sections indicate that both the executive branch and Congress recognize the substantial private benefit that is created by the contracting out policies of the federal government. The policy may result in government cost savings, but it also benefits commercial interests, both large and small. Consequently, free enterprise and the commercial segments of society with goods and services needed by the public sector have a bona fide interest in government contracting out and a concomitant interest in its implementation.

III

REQUIRING AGENCIES TO BARGAIN OVER UNION PROPOSALS REGARDING CONTRACTING OUT WILL RESULT IN LESS EFFICIENT GOVERNMENT

In *Department of Defense, Army-Air Force Exchange Service v. Federal Labor Relations Authority*, 659 F.2d 1140, the court noted that the negotiability of a proposal does not mean that the agency must agree to it; such a negotiability finding merely requires that the agency bargain in good faith upon the union's request. *Id.* at 1147. How then does the negotiation of the union's proposal in the case at bar affect management's determinations regarding contracting out?

First, it is important to realize that Section 7106 is a reservation of management rights. These powers are reposed in the governing authority of the agency—the management officials who are best qualified to make decisions concerning those areas as they relate to agency operations. Given the importance of this section, courts have held proposals, which impact on these substantive

rights, nonnegotiable.[5] Facially, there may appear to be no impact on the Section 7106(a) rights until the proposal is actually adopted. Nonetheless, negotiability alone does indeed impact management's rights.[6]

This position is logical. After all, the union's sole purpose in negotiating the proposal is to ensure its adoption into a collective bargaining contract. Such an adoption would be inconsistent with the reserved management authority. This being so, the initial negotiation of the proposal is equally prohibited, since it cannot be adopted into the contract without ignoring Section 7106(a). The court in *National Treasury Employees Union*, 691 F.2d at 563, recognized this when it held that Section 7106(a), by reserving invaluable management rights, insulated them from dilution at the bargaining table. Hence, since the proposal would dilute management authority, it is infringing on that authority and is thus nonnegotiable.

By holding the applicability of the circular nonnegotiable, contracting out determinations can be pursued unhindered. Management will thus feel free to vigorously

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[5] *See American Federation of Government Employees, AFL-CIO, Local 1968 v. Federal Labor Relations Authority*, 691 F.2d 565 (D.C.Cir. 1982), proposal regarding the formulation of performance measures held nonnegotiable; *Department of Defense, Army-Air Force Exchange Service v. Federal Labor Relations Authority*, 659 F.2d 1140, proposals conditioning job assignments or seniority held nonnegotiable; *National Treasury Employees Union v. Federal Labor Relations Authority*, 691 F.2d 553, proposal addressing critical job elements for performance review confined to management and not negotiable.

[6] *National Treasury Employees Union v. Federal Labor Relations Authority*, 691 F.2d 553, determination of nonnegotiability insulates Section 7106(a) rights from "dilution at the bargaining table." *Id.* at 563.

implement Circular A-76 without having to speculate whether a contracting out determination will be the subject of a grievance adjustment.

In combination with this, of course, is the motivation of the union. By drafting proposals concerning contracting out and then appealing an agency's refusal to negotiate, the agency will inevitably be delayed in making contracting out determinations. Moreover, such tactics would undoubtedly be employed without considering the merits of the contracting out process itself and its efficiency potentials.

As mentioned earlier, in propounding a proposal, the union hopes to incorporate it within a collective bargaining agreement. Such a result would be to the detriment of government efficiency because the ultimate authority to contract out would be shifted from agency management pursuant to Section 7106(a) into the hands of an arbitrator. An arbitrator is less qualified to make such a determination than the officials who are familiar with their administrative agencies and thus are best able to gauge cost-effectiveness. Removing such determinations from an agency's discretionary realm to an arbitrator would unnecessarily obstruct implementation of Circular A-76.

CONCLUSION

The current administration is presently engaged in a broad program designed to reduce federal spending, and extensive implementation of Circular A-76 is one area in which substantial cost savings are expected—some $7 billion over three years. This estimate, however, will require

vigorous use of the circular and its guidelines. The president's private sector cost study group recognized this and pressed for greater implementation of the circular. In order to achieve the cost savings potential held by Circular A-76, management needs unhindered freedom in its contracting out determinations; union proposals and manipulation of the statutory grievance procedure designed to stall management decisions cannot be tolerated. Only through greater exercise of managerial discretion will the public and private benefits of Circular A-76 be fully realized.

DATED: August, 1985.

Respectfully submitted,

RONALD A. ZUMBRUN
JOHN H. FINDLEY
COUNSEL OF RECORD
JONATHAN M. COUPAL
OF COUNSEL
Pacific Legal Foundation
555 Capitol Mall, Suite 350
Sacramento, California 95814
Telephone: (916) 444-9154

Attorneys for Amicus Curiae
Pacific Legal Foundation